IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH
AT HYDERABAD

(Special Original Jurisdiction)

WEDNESDAY, THE NINETEENTH DAY OF JANUARY
TWO THOUSAND AND FIVE

PRESENT

THE HON'BLE SRI JUSTICE M.H.S. ANSARI

AND
THE HON'BLE SRI JUSTICE ELIPE DHARMA RAO

WRIT PETITION No. 20418 of 2004

Between:

1.V. Adinarayana, S/o. Ramaiah,
R/o Plot No.417, Vivekananda Nagar Colony,

Kukatpally, Hyderabad.

2.Sri Kamala Coach Builders, rep. by Managing Partner,

P. Rama Babu, S/o. Sri P. Sreemannarayana,
R/o. LIG-188, APIIC Colony, Jeedimetla, Ranga Reddy District.
3.Mrs. P. Jhansi, W/o. Sri P. Krishna Mohan,
R/o. LIG-187, APIIC Colony, Jeedimetla, Ranga Reddy District.

..... PETITIONERS

AND

1.Andhra Bank, rep. by Authorised Officer and

Chief Zonal Officer, Andhra Bank Buildings,

Sultan Bazar, Hyderabad.
2.Andhra Pradesh Industrial Infrastructure

Corporation Limited, rep. by Senior Manager (E),

Zonal Office, Industrial Estate, Sanathngar, Hyderabad.
3.Commercial Tax Officer (FAC),

Ferozguda Circle, Hyderabad.
4.Deputy Commercial Tax Officer,

Jeedimetla Circle, II Floor, Gaganvihar, Nampally, Hyderabad.

....RESPONDENTS

Petition under Article 226 of the Constitution of India praying that in the circumstances stated in the affidavit filed herein the High Court may be pleased to issue any appropriate Writ, order, direction more particularly a Writ of Mandmaus and declare that the petitioners are not liable to discharge any of the statutory dues of M/s. Sree Lekha Industries and no such dues can be recovered by respondents 3 and 4 herein by selling the property consisting of Industrial building (Shed) including land, Plot No.III, Phase V, IDA, Jeedemetla, Hyderabad, Ranga Reddy District which was purchased by the petitioners in Public auction and grant the consequential relief by quashing the notice of Attachment dt.17-8-2004 issued by the 4th respondent.

Counsel for the Petitioners : Mr.DANTU SRINIVAS

Counsel for Respondent No.1: Mr. NUTY RAMAMOHAN RAO

Counsel for Respondent No.2: Mr. E. MADAN MOHAN RAO

Counsel for Respondent Nos.3 & 4: G.P.FOR COMMERCIAL TAXES

The Court at the admission stage made the following :

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ORDER: (per Hon'ble Sri Justice M.H.S.Ansari)

The facts relevant for disposal of the present writ petition, as can be gathered from the pleadings of the respective parties hereto, briefly stated, are as under:

One M/s. Sree Lekha Industsries became the highest bidder at the public auction conducted by second respondent Corporation, exercising the powers under Section 29 of the State Financial Corporations Act, 1951 for realization of the dues payable by M/s. Kusumamba Agencies Workshop. Respondent No.1 (Andhra Bank) sanctioned to the said M/s. Sree Lekha Indusstries, capital finance, and an amount of Rs.10,00,000/- was sanctioned as open cash credit. The said M/s.Sree Lekha Industries is said to have furnished security to the respondent Bank by mortgaging the property purchased in the aforesaid auction conducted by second respondent (A.P. Industrial Infrastructure Corporation Ltd.). As the said M/s.Sree Lekha Industries committed default, the account maintained by them was declared by the

respondent Bank as non-performing asset on 22-8-2001. In exercise of powers conferred under Section 13(1) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as 'the SERFAESI Act'), possession notice was issued by the respondent Bank on 20-7-2002 and physical possession was taken of the mortgaged properties by first respondent Bank on 9-10-2002. Auction was conducted pursuant to notice dated 14-2-2004 said to have been published in the local newspapers stating that the date of auction would be 20-3-2004. Second petitioner participated in the auction through first petitioner and rights of the property in question were knocked down in favour of first petitioner on 20-3-2004 being the highest bidder by bidding an amount of Rs.24,00,000/-. First respondent Bank also communicated on 23-7-2004 to second respondent Corporation that the leasehold rights of the said property have been knocked down in favour of the petitioners herein and since they (petitioners) have paid the entire amount, second respondent may proceed further in the matter and complete necessary formalities.

The stand of second respondent Corporation is that the title and ownership of the premises in question remained with second respondent Corporation as no sale deed was executed in favour of the aforesaid M/s. Sree Lekha Industries. It is the further case of second respondent that respondent No.1 Bank is entitled to sell the leasehold rights over the premises only and thus the petitioners would be entitled to the leasehold rights of the premises and not to the ownership over the premises in question. We are not required in these proceedings to adjudicate on this aspect of the matter as no relief has been claimed against second respondent Corporation. The reliefs claimed in the instant writ petition are with respect to the action of the respondent Sales Tax authorities seeking to realise sales tax dues of the aforesaid dealer from the petitioners.

It is the case of fourth respondent – Deputy Commercial Tax Officer that the aforesaid M/s.Sree Lekha Industries were registered dealers under the Andhra Pradesh General Sales Tax Act (for short 'the A.P.G.S.T. Act') and the Central Sales Tax Act (for short 'the C.S.T. Act') and were assessees on the rolls of third respondent (Commercial Tax Officer). Third respondent being the assessing authority completed the assessment of the said dealer for the years 1999-2000 and 2000-2001. The said dealer was in arrears of tax in the said years as under:

2000. Rs.3,56,292-00

2000-2001 Rs.4,01,994-00

A notice of demand was issued on 29-7-2004 under the Revenue Recovery Act and as the said notice sent by Registered Post Ack.Due on 5-8-2004 returned unserved, Form 4 Notice was served by affixture under a panchanama. The date, however, of such affixation is not stated in the counter affidavit. It is, however, stated that Form 5 Notice was issued on 17-8-2004 attaching the property of the defaulting dealer; both these dates being subsequent to the auction held on 20-3-2004 and much after the date on which the Bank took physical possession of the property on 9-10-2002. It is, however, the contention of the respondent Sales Tax authorities that the sales tax arrears due under the A.P.G.S.T. Act have got priority by virtue of Section 16-C of the A.P.G.S.T. Act and that the same prevails over the mortgage of the financial institutions including first respondent Bank. It is further stated in the counter affidavit of fourth respondent that second respondent Corporation was informed not to transfer the property in question unless a tax clearance certificate is received from third respondent. However, second respondent Corporation informed that the property had already been sold by first respondent Bank in auction to the petitioners, and advised the Sales Tax Department to approach the Bank which is holding the sale proceeds of the property relating to the said dealer M/s. Sree Lekha Industries. On this aspect, the case of the respondent tax authorities is that by virtue of Section 18 of the A.P.G.S.T. Act, the petitioners are obliged to pay the entire arrears of sales tax due by the aforesaid M/s. Sree Lekha Industries.

The petitioners' case is that they are bona fide purchasers for value at a public auction and have no notice of the aforesaid tax dues and, therefore, they have no liability to pay any tax dues of the aforesaid defaulter M/s. Sree Lekha Industries. It is the duty of the respondent Bank to discharge all statutory dues of M/s. Sree Lekha Industries and the balance thereafter alone is to be appropriated towards discharge of the respondent Bank's dues. It is further contended on behalf of the petitioners that first respondent Bank is holding the amount in trust and it is its duty to pay the same to the Government. The petitioners, it is contended, have no liability to discharge the dues of the aforesaid defaulter with whom they have no concern. Further, directions have also been prayed for in the writ petition to quash the notice of attachment dated 17-8-2004.

Mr. D.Srinivas, learned counsel for the petitioners, reiterated the above contentions in support of the relief prayed for in the writ petition viz., that the petitioners are not liable for payment of any sales tax dues of the said defaulter. Mr. D.Srinivas further contended that the notice of attachment issued subsequent to the purchase of the property in question by the petitioners is impermissible as that property was sold at a public auction by the respondent Bank in exercise of the powers vested in it under the SERFAESI Act. The petitioners are bona fide purchasers for value without notice of prior charge and, therefore, the petitioners' property cannot be sold for realization of the aforesaid tax dues. The claims, if any, of the Commercial Tax Department towards arrears of the dealer in default, having priority over the Bank's dues and being statutory first charge, are recoverable from the sale proceeds held by the Bank, it was urged. Reliance was placed on certain decisions of the Supreme Court, reference to which shall be made at appropriate stage.

Mr. Deepak Bhattacharjee, learned counsel for the respondent Bank contended that the SERFAESI Act has overriding effect by virtue of Section 35 and, therefore, the respondent Bank has no liability towards the tax dues of the defaulter.

Learned Special Standing Counsel for Commercial Taxes submitted that the tax dues of the State have primacy over the dues of financial institutions including secured creditors by virtue of Section 16-C of the A.P.G.S.T. Act and, therefore, it is entitled to recover its dues. The impugned attachment Notice is sought to be sustained relying upon the provisions in Section 18 of the A.P.G.S.T.Act.

Insofar as Section 18 of the A.P.G.S.T. Act is concerned, it may be stated that the petitioners are not the transferees in respect of the business of the dealer. The ownership of the business has not been transferred to the petitioners. They are purchasers of the property at a public auction conducted by the respondent Bank under the provisions of the SERFAESI Act. Therefore, Section 18 of A.P.G.S.T. Act which deals with the recovery of tax where a business of a dealer is transferred would have no application.

Mr. Deepak Bhattacharjee, learned counsel for the respondent Bank, relying upon Section 35 of the SERFAESI Act, contended that by virtue of Section 35, the

provisions of that Act have been given overriding effect over the other laws notwithstanding anything inconsistent therewith contained in any other law. Reliance was placed by Mr. Deepak Bhattacharejee upon Section 13 of the SERFAESI Act and more particularly to sub-section (7) thereof. It lays down the procedure with regard to the application of the moneys realized by the secured creditors (Bank). It would be appropriate to extract sub-section (7) of Section 13 of the SERFAESI Act, which reads as under:

> "Where any action has been taken against a borrower under the provisions of sub-section (4), all costs, charges and expenses which, in the opinion of the secured creditor, have been properly incurred by him or any expenses incidental thereto, shall be recoverable from the borrower and the money which is received by the secured creditor shall, in the absence of any contract to the contrary, be held by him in trust, to be applied, firstly, in payment of such costs, charges and expenses and secondly, in discharge of the dues of the secured creditor and the residue of the money so received shall be paid to the person entitled thereto in accordance with his rights and interests."

Mr.D.Srinivas, learned counsel for the petitioners, referred to sub-section (10) of Section 13 of the SERFAESI Act, which reads as under:

> "Where dues of the secured creditor are not fully satisfied with the sale proceeds of the secured assets, the secured creditor may file an application in the form and manner as may be prescribed to the Debts Recovery Tribunal having jurisdiction or a competent court, as the case may be, for recovery of the balance amount from the borrower."

It was, therefore, the submission of Mr. D.Srinivas that there is nothing in sub-section (7) of Section 13 which can be said to be in conflict with the provisions contained in the A.P.G.S.T. Act and more particularly Section 16-C thereof, to give the Bank's dues primacy or priority over the tax arrears due to the State. Section 16-C of the A.P.G.S.T. Act, upon which reliance has been placed also by the learned Special Standing Counsel for Commercial Taxes reads as under.

> "**16-C.Liability under this Act to be the first charge:** Notwithstanding anything to the contrary contained in any law for the time being in force, any amount of tax, Government loan extended to the dealer due to treating deferred tax as deemed to have been paid, penalty, interest and any other sum if any, payable by a dealer or any other person under this Act, shall be the first charge on the property of dealer, or such person."

A perusal of Section 16-C would show that the first charge is created on the property of a dealer who is due any amount under the A.P.G.S.T. Act. In effect, Section 16-C accords primacy to all moneys due under the A.P.G.S.T. Act and being

a first charge created by operation of law will have priority over all the dues. A similar provision being Section 11-AAAA of the Rajasthan Sales Tax Act, 1954 was construed by the Supreme Court in **State Bank of Bikaner & Jaipur v. National Iron & Steel Rolling Corporation** as creating a first charge by operation of law and that charge, it was held, will have precedence over an existing mortgage. It would be appropriate to extract the relevant conclusions of the Supreme Court in that case, which are as under:

> "In the present case, the section creates a first charge on the property, thus clearly giving priority to the statutory charge over all other charges on the property including a mortgage. The submission, therefore, that the statutory first charge created by section 11-AAAA of the Rajasthan Sales Tax Act can operate only over the equity of redemption, cannot be accepted. The charge operates on the entire property of the dealer including the interest of the mortgagee therein……..Looked at a little differently, the statute has created a first charge on the property of the dealer. What is meant by a "first charge"? Does it have precedence over an earlier mortgage? Now, as set out in *Dattatreya Shanker Mole's* case (1974) 2 SCC 799, a charge is a wider term than a mortgage. It would cover within its ambit a mortgage also. Therefore, when a first charge is created by operation of law over any property, that charge will have precedence over an existing mortgage."

Similar view has been expressed by the Supreme Court in **State of M.P. v. State Bank of Indore** with respect to Section 33-C of the M.P. General Sales Tax Act, 1958, which provision is in *pari materia* with Section 16-C of the A.P.G.S.T.Act.

We are not concerned in these proceedings with the claims/rights if any, *inter se* the rival charge-holders viz., respondent Bank and Sales Tax authorities. It is, therefore, not necessary to adjudicate upon the rival contentions, noticed supra, of the said respondents. This is for the reason that the respondent Sales Tax authorities have merely proceeded against the property by attachment thereof for realisation of the tax arrears of the dealer in default after it was sold by the Bank and purchased by the petitioners herein at a public auction. Hence, it is not appropriate to adjudicate, in these proceedings, the rights *inter se* the charge-holders and the mortgagee Bank or on any questions touching upon such rights in the absence of any claim, relief or pleadings in that behalf. Therefore, the only question for consideration in the present proceedings is as to whether the said charge can be enforced against the property in question in the hands of the transferee?

The property in question was sold in an auction conducted by first respondent Bank in exercise of the statutory power conferred on it under Section 13 of the SERFAESI Act. The aforesaid action taken by the Bank for realisation of its dues against the

secured assets is not in question in these proceedings. First respondent Bank realised a sum of Rs.24,00,000/- at the said auction conducted by it on 20-3-2004. The auction was preceded by a notice dated 20-7-2002 and physical possession of the mortgaged properties was taken by the respondent Bank on 9-10-2002. Thereafter, auction was held on 20-3-2004 pursuant to a notice published in that behalf on 14-2-2004. Once the property/secured asset is sold at the instance of a mortgagee (secured creditor), there is no further saleable interest left in the mortgagor (M/s. Sree Lekha Industries) to be sold again. The respondent tax authorities are aware of the auction as can be seen from the averments in their counter affidavit, referred to earlier. The only step for recovery of tax dues taken by the respondents was by attachment of the property much after its sale. Section 16-C of the A.P.G.S.T. Act, though creates a charge on the property and person of the dealers in default, does not, in terms, state that the charge can be enforced against any property in the hands of a transferee for consideration without notice of the charge. There is nothing brought on record by the respondent Sales Tax authorities to show that the transferees (petitioners) can be imputed with the knowledge of the aforesaid charge. The petitioners are the purchasers for value in a public auction conducted in exercise of the powers under Section 13 of the SERFAESI Act and, thus, they are transferees for consideration, and as already seen, without notice of the charge. The petitioners are thus protected by the general prohibition contained in latter part of Section 100 of the Transfer of Property Act which lays down that no charge shall be enforced against any property in the hands of a transferee for consideration without notice of the charge. We are fortified in this view by the judgment of the Supreme Court in **Ahmedabad Municipal Corporation of the City of Ahmedabad v. Haji Abdul Gafur Haji Hussenbhai**.

In the circumstances, it must be held that the charge for the arrears of sales tax dues of M/s. Sree Lekha Industries cannot be realised from the property in the hands of the transferee, in the case on hand, the petitioners herein.

Accordingly, the writ application is liable to be and is allowed in part declaring that the arrears of sales tax dues of M/s. Sree Lekha Industries is not recoverable from the property in question, subject matter of auction by first respondent Bank and purchased by the petitioners. Consequently, the State – respondents are restrained from proceeding to realise from the said property the sales tax arrears of M/s. Sree Lekha Industries pursuant to the impugned attachment notice.

Subject to the above, it is clarified that this order, however, shall not preclude the respondent sales tax authorities from recovering its dues in accordance with law. In the facts and circumstances of this case, however, there shall be no order as to costs.

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(M.H.S.ANSARI, J.)

19th January 2005.

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(ELIPE DHARMA RAO, J.)

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To

1.The Authorised Officer and Chief Zonal Officer, Andhra Bank, Andhra Bank Buildings, Sultan Bazar, Hyderabad.
2. The Senior Manager (E), Zonal Office Andhra Pradesh Industrial Infrastructure

Corporation Limited, Zonal Office, Industrial Estate, Sanathngar, Hyderabad.
3. The Commercial Tax Officer (FAC), Ferozguda Circle, Hyderabad.
4. The Deputy Commercial Tax Officer, Jeedimetla Circle, II Floor, Gaganvihar, Nampally, Hyderabad.

5. Two C.Cs to Govt. Pleader for Commercial Taxes, High Court Bldgs., Hyderabad (OUT).

6. Two C.D. copies.